No. 80-1621

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the doctrine of primary jurisdiction does not require the Interstate Commerce Commission to interpret an unambiguous tariff.

2. Whether, in the circumstances of this case, petitioner was entitled to present evidence showing that it believed that the tariff permitted it to make concessions alleged by the indictment to be unlawful.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-3) and the district court (Pet. App. 5-21) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1980. A petition for rehearing was denied on January 26, 1981 (Pet. App. 4). The petition for a writ of certiorari was filed on March 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is a prosecution under the Elkins Act, former 49 U.S.C. 41(1),[1] against a railroad for making concessions to its shipper customers that were not permitted by the railroad's tariff on file with the Interstate Commerce Commission. Following a trial by jury in the United States District Court for the Central District of California, petitioner was convicted on 48 counts of offering and granting illegal concessions. The district court imposed fines totaling $25,000 on five counts of the indictment. It also imposed fines totaling $860,000 on the remaining 43 counts, and imposed a three-year term of probation. The fines totaling $860,000 were suspended during probation. The court of appeals affirmed (Pet. App. 1-3).

1. The government's evidence at trial showed that in 1975 petitioner offered trailer-on-flat-car service through published tariffs. Under this kind of service, the shipper delivers its trailers by motor vehicle to the railroad's ramp at the point of origin, and the shipper's consignee picks them up and drives them

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[1] Section 41(1) was originally enacted in 1903 as part of the Elkins Act and is today codified (with certain nonsubstantive changes) at 49 U.S.C. (Supp. III) 11903-11904. Section 41(1) provides in pertinent part:

> [I]t shall be unlawful for any person * * * to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property * * * whereby any such property shall * * * be transported at a less rate than that named in the tariffs published and filed by such carrier * * *. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, * * * shall be deemed guilty of a misdemeanor * * *.

away by motor vehicle from the railroad's ramp at the point of destination. The tariff prescribed a line-haul transportation charge applying to transportation from ramp to ramp (see Pet. 4-5). The tariff specified that when a trailer is furnished by the railroad, the shipper must pay an additional "accessorial" or rental charge (*id.* at 6).

The evidence also showed that California law requires that trailers, originated and licensed in other states but shipped to California and driven from the railroad's ramp over California highways, must be registered and licensed in California. In 1975, petitioner obtained and paid for numerous 5-day permits that permitted its customers to drive the railroad's trailers on California highways after pickup. Nothing in the tariff filed by petitioner with the Interstate Commerce Commission permitted it to make those payments or concessions for its customers, or even referred to state permit requirements and expenditures (Pet. App. 5-7).

Effective July 6, 1976, petitioner amended its tariff by adding a provision expressly permitting it to provide, with respect to railroad furnished trailers, "proper licensing of such trailer or trailers for highway transportation to and/or from [petitioner's] ramp location in Arizona or California or New Mexico" (Pet. App. 7).

2. During the course of the trial, the district court allowed the pertinent tariff provisions to be presented to the jury but denied petitioner's request to introduce evidence that purportedly showed that it had a good faith belief that the tariffs permitted the payments in question (Pet. App. 10).[2] Following the

[2] This included evidence that purported to show the usage and understanding of the industry regarding such payments. *Ibid.*

jury's verdict, petitioner moved for an acquittal or new trial on the grounds, *inter alia*, that extrinsic evidence concerning the meaning of the tariff should have been admitted; that the tariff should have been referred to the Interstate Commerce Commission pursuant to the doctrine of primary jurisdiction for administrative interpretation; and that the district court improperly excluded evidence showing petitioner's good faith misunderstanding of the tariff. The district court denied the motions on the ground that the tariff is unambiguous and that a carrier's purported mistake as to the meaning of its own tariff is not a defense under the Elkins Act provisions applicable to carriers (Pet. App. 5-22). In so ruling, the court noted that, on several occasions before petitioner amended its tariff, a Commission employee had warned petitioner that its actions were in likely violation of the Elkins Act (*id.* at 14-15). The court also noted that, during the relevant period, petitioner's own trailer receipt contracts provided that the receiver of the trailers, and not petitioner, was required to pay all state license expenses (*id.* at 17). In affirming the convictions, the court of appeals agreed with the district court that the tariffs were unambiguous, that reference to the Commission therefore was not required under the doctrine of primary jurisdiction, and that a carrier's misconstruction of its own tariff is not a defense in an Elkins Act prosecution (Pet. App. 1-3).

ARGUMENT

1. Petitioner argues (Pet. 12-15) that the district court and the court of appeals erred in declining to refer the tariff to the Commission for interpretation under the doctrine of primary jurisdiction. That claim is without merit.

As petitioner acknowledges (Pet. 12), this Court ruled in *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 64 (1956), that

> [n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

The primary jurisdiction analysis thus turns on the particular facts of each case and "depends on whether the [case] raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act." *Id.* at 65. See also *United States* v. *United States Steel Corp.*, No. 80-1206 (8th Cir. Apr. 1, 1981), slip op. 11-17.[3]

Under these principles, the courts below correctly concluded that reference of the tariff was not required. Both courts concluded that the tariff was unambiguous and required no administrative expertise to resolve uncertainties, construe terms of art, or reconcile prior agency interpretations. Petitioner

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[3] *United States Steel Corporation* involved an Elkins Act prosecution against a shipper. The Eighth Circuit concluded that the tariff at issue should have been referred to the Commission for initial interpretation under the doctrine of primary jurisdiction. The court's conclusion was based on its determination that the tariff was ambiguous, that prior Commission decisions had not resolved its meaning, and that complex issues of discrimination required the Commission's expert judgment. Slip op. 11-17. Those circumstances are fundamentally different from the circumstances in the present case, and in view of the Eighth Circuit's recognition that the application of the primary jurisdiction doctrine turns on the facts of each case (*id.* at 11-12), there is no conflict with respect to the governing legal principles.

offers no convincing reason for invoking the primary jurisdiction doctrine in such circumstances. Petitioner's argument, in essence, is that its tariff was ambiguous and required agency interpretation because the tariff did not *prohibit* petitioner from paying for the highway permits (see Pet. 9). But the fact that a tariff does not prohibit a carrier from making payments on behalf of a shipper provides no support for the claim that it permits such payments. The statute forbids all rebates and concessions that depart from the rates expressly set forth in the tariff. Petitioner cites no language in the tariff that suggests that the payments were permissible, nor any prior Commission decision supporting its contention. Indeed, as the district court noted (Pet. App. 17), the evidence at trial showed that petitioner's own trailer receipt contracts provided that the recipient of the trailers, and not petitioner, must pay for all state licenses.

Contrary to petitioner's claim (Pet. 13-14), this case raises no broad question of national transportation policy requiring an agency interpretation. This prosecution involves no question of reasonableness, discrimination, or a carrier's right to authorize license payments in its tariff. Indeed, in 1976 petitioner amended its tariff to permit it to make the very payments it is charged with impermissibly making in 1975 (Pet. 7-8). Accordingly, the narrow factual question in this case is whether petitioner's tariff, in effect before 1976, permitted it to make the challenged payments. That factual question does not warrant this Court's review.[4]

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[4] Because there was no ambiguity in petitioner's tariff that would require reference to the Commission, there is no merit to petitioner's related contention (Pet. 15-17) that the district court should have permitted it to introduce evidence of

2. Petitioner also argues (Pet. 18-20) that it should have been allowed to present evidence showing that it believed that its tariff permitted the challenged payments on behalf of its shippers even if that belief was erroneous as a matter of law. In the circumstances of this case, however, the courts below correctly concluded that no such defense was available to petitioner.

What a tariff means is a question of law, and a purported mistake of law is ordinarily not a defense in either civil or criminal proceedings. See *United States* v. *International Minerals Corp.*, 402 U.S. 558, 562-564 (1971). Decisions of this Court and the courts of appeals have held that the Elkins Act only requires proof that the defendant knew what the tariff said and what payments it made or received. The Act does not permit a defense based on subjective belief that the tariff means other than what it says. See *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Union Petroleum Corp.* v. *United States*, 376 F.2d 569, 573 (10th Cir. 1967). As this Court stated in *Union Pacific R.R.* v. *United States*, 313 U.S. 450, 462 (1941): "Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention" (footnote omitted). See also *United States* v. *General Motors Corp.*, 226 F.2d 745, 748 (3d Cir. 1955).

Petitioner's reliance on *Lehigh Coal and Navigation Co.* v. *United States*, 250 U.S. 556 (1919), is wholly misplaced in the present context. In that case, the allowance received by the defendant shipper was specifically authorized by a footnote in the tariff.

"usage of trade" that purportedly would show that other railroads also paid for temporary permits on behalf of their customers.

The government's only objection was that the footnote did not directly specify the amount of the allowance, but referred to another contract for such information. Moreover, the evidence showed that Commission officials had been aware of the payments and had not objected to them, and that at least one Commission official specifically approved the form of the tariff. See *id.* at 560-566. In those circumstances, this Court held that Congress did not intend to impose liability. In the present case, in contrast, there was nothing in the tariff that authorized the challenged payments. Furthermore, as the district court correctly observed in distinguishing *Lehigh* (Pet. App. 14-15):

> In the case at hand, the Interstate Commerce Commission did not sanction defendant's payment of the trip permits, but indeed an ICC representative, on several occasions before the tariff was amended, informed the defendant that its actions were improper and in likely violation of the Elkins Act. In addition, *Lehigh Coal* involved prosecution of a shipper for acceptance of concessions, whereas here defendant carrier drafted the tariff and is, correspondingly, held to a higher standard of knowledge of it.

Recently, in *United States* v. *United States Steel Corp.*, *supra*, the Eighth Circuit, in remanding an Elkins Act prosecution against a shipper for further proceedings under the primary jurisdiction doctrine, stated in dictum that the defendant could raise a defense concerning its good faith and reasonable belief that the tariff permitted its actions. Slip op. 17-23. There are several fundamental differences between this case and *United States Steel*. Accordingly, whether or not the Eighth Circuit's conclusion

was correct, there is no conflict between the Eighth and Ninth Circuits.

First, the court in *United States Steel* emphasized that a good faith defense would be available only if the shipper proved both that it honestly believed that the tariff permitted its actions and also that its belief was a reasonable one. Because both the district court and the court of appeals in that case agreed that the tariff was ambiguous on its face, the court of appeals concluded that it might be possible for the defendant to demonstrate the reasonableness of its belief. In the present case, in contrast, both the district court and court of appeals correctly concluded that there was no ambiguity in the tariff, and petitioner's purported belief that the tariff permitted its rebates (despite warnings from Commission officials) could not be reasonable.

Second, the proceeding in *United States Steel*, as in *Lehigh Coal and Navigation Co.*, was against a *shipper*, while this case is a prosecution against a *carrier*. Whether or not a shipper may have a defense of good faith mistake concerning a tariff's meaning, the Elkins Act specifically provides that carriers—who draft their own tariffs and are free to amend or clarify tariff provisions—are held to a standard of strict liability. Thus, as the district court noted in this case (Pet. App. 8-9), former 49 U.S.C. 41(2)[5] provides in pertinent part (emphasis supplied):

> Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the [Interstate Commerce] Act * * * or participates in any

[5] Section 41(2) is recodified without substantive change in 49 U.S.C. (Supp. III) 11916.

> rates so filed or published, *that rate as against such carrier*, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, *shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed an offense under this section.*

As this Court stated in *United States* v. *Braverman*, 373 U.S. 405, 406 (1963): "More unequivocal language would be hard to imagine." Thus, at least as far as carriers are concerned, "any departure" from the rate prescribed by tariff is conclusively "deemed an offense under this section." The courts below correctly declined to disregard this explicit statement of congressional intent. See generally *United States* v. *Park*, 421 U.S. 658, 672-673 (1975).

In sum, no case of this Court or of any court of appeals has held or even suggested that a carrier may defend an Elkins Act prosecution on the ground that it entertained a good faith misconstruction of its own unambiguous tariff. There is thus no reason for this Court to grant review of petitioner's contention to this effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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